

**A Muhamad Saleh bin Hashim & Ors v
Percon Corp Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7-22-787 OF 1999
ABDUL MALIK ISHAK J
16 MAY 2003

Civil Procedure — Parties — Third party notice — Issuance of — Circumstances in which issued — Whether leave should be granted to issue third party notice against DBKL — Rules of the High Court 1980 O 16

Land Law — Trespass — Unlawful occupation — Plaintiff's houses flooded due to defendant's highway project — Whether illegal occupiers have rights — National Land Code s 425

The plaintiff and 71 others were illegal squatters who had unlawfully erected huts along the river banks of Sungai Klang. The defendant was a private limited company that carried on the business of general construction. The plaintiff's claim was based on negligence in that as a result of the defendant's project in building a highway project, the land on which the plaintiff's houses were built were flooded. The defendant alleged that the floods were caused by the inadequate drainage system. Upon filing the statement of defence, the defendant had filed the summons for leave to issue a third party notice against Datuk Bandar Kuala Lumpur ('DBKL') (the first third party notice) and Majlis Perbandaran Ampang Jaya ('MPAJ'), the second proposed third party (MPAJ had consented to the application for the summons for leave to issue the third party notice and it was accordingly issued). The present appeal focused solely on whether leave should be granted to issue the third party notice against DBKL.

Held, dismissing the appeal with costs:

- (1) It is trite law that before leave to issue a third party notice is granted to the defendant against the first proposed third party, the defendant must show a prima facie case (see p 489D).
- (2) The purported duty imposed on the first third party was entirely without any basis as the plaintiffs were illegal squatters and had illegally erected squatter huts on the river banks of Sg Klang and in doing that they had contravened s 425 of the National Land Code 1965; s 70(13) of the Street, Drainage and Building Act 1974 and regs 18, 19 and 20 of the Essential (Clearance of Squatters) Regulations 1969 (see p 495D–F).
- (3) The purported damage as pleaded and framed in the statement of claim arose directly from the illegal acts of the plaintiff and his friends and that being the case, the issue of compensation did not arise at all (see p 514A).
- (4) Based on the undisputed facts, the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) should be

vigorously applied in the present case and it would be a waste of judicial time to grant leave to issue a third party notice to the first proposed third party — a non-entity. Thus, it was not a fit and proper case for a third party notice to be issued to either the first proposed third party or to Datuk Bandar Kuala Lumpur (DBKL) (see p 514D–F).

A
B

[Bahasa Malaysia summary]

Plaintif dan 71 orang yang lain merupakan penduduk haram setingan yang secara tidak sah telah membina pondok-pondok di sepanjang tebing Sungai Klang. Defendan adalah sebuah syarikat sendirian berhad yang menjalankan perniagaan pembinaan am. Tuntutan plaintif adalah berdasarkan kecuaiian di mana akibat daripada projek defendan membina satu projek jalanraya, tanah di mana rumah-rumah plaintif dibina telah dilanda banjir. Defendan telah mengatakan bahawa banjir berlaku akibat sistem perparitan yang tidak betul. Setelah memfailkan pernyataan pembelaan, defendan telah memfailkan saman untuk memohon dikeluarkan satu notis pihak ketiga terhadap Datuk Bandar Kuala Lumpur ('DBKL') notis pihak ketiga yang pertama) dan Majlis Perbandaran Ampang Jaya ('MPAJ'), pihak ketiga kedua yang dicadangkan (MPAJ telah bersetuju dengan permohonan untuk saman memohon kebenaran mengeluarkan notis pihak ketiga tersebut dan ia dengan wajarnya telah dikeluarkan). Rayuan semasa semata-mata memfokuskan sama ada kebenaran patut diberikan untuk mengeluarkan notis pihak ketiga kepada DBKL.

C
D
E

Diputuskan, menolak rayuan tersebut dengan kos:

- (1) Adalah undang-undang tetap bahawa sebelum kebenaran untuk mengeluarkan satu notis pihak ketiga diberikan kepada defendan terhadap pihak ketiga pertama yang dicadangkan, defendan perlu menunjukkan satu kes prima facie (lihat ms 489D).
- (2) Kewajipan yang dikatakan dikenakan ke atas pihak ketiga yang pertama langsung tiada asas kerana plaintif-plaintif merupakan penduduk haram setingan dan secara tidak sah telah membina pondok-pondok di tebing Sungai Klang dan dengan berbuat demikian telah melanggar s 425 Kanun Tanah Negara; s 70(13) Akta Jalan, Parit dan Bangunan 1974 dan peraturan-peraturan 18, 19 dan 20 Peraturan-Peraturan Penting (Pembasmian Setingan) 1969 (lihat ms 495D–F).
- (3) Kerosakan yang dikatakan sebagaimana yang diplidkan dan dibentuk dalam pernyataan tuntutan timbul secara langsung dari tindakan-tindakan plaintif dan rakan-rakannya yang menyalahi undang-undang dan jika begitu, persoalan tentang pampasan tidak timbul langsung (lihat ms 514A).
- (4) Berdasarkan fakta-fakta yang tidak dipertikaian, *maxim ex turpi causa non oritur actio* (no cause of action arises out of a base cause)

F
G
H
I

- A** hendaklah digunakan dalam kes semasa dan ia akan membazir masa kehakiman jika kebenaran untuk mengeluarkan notis pihak ketiga dibenarkan kepada pihak ketiga pertama yang dicadangkan— yang bukan satu entiti. Oleh itu, ia bukan satu kes yang sesuai dan betul untuk satu notis pihak ketiga dikeluarkan kepada pihak ketiga pertama yang dicadangkan atau kepada DBKL (lihat ms 514D–F).]
- B**

Notes

For cases on third party notices, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4361–4362.

- C** For cases on unlawful occupation, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4090–4099.

Cases referred to

- Alexandrou v Oxford* [1993] 4 All ER 328 (refd)
- D** *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 (distrd)
- Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (refd)
- Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 (refd)
- E** *Bank of New Zealand v Greenwood* (1984) 1 NZLR 525 (refd)
- Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781 (refd)
- Capital & Counties Plc v Hampshire County Council* [1997] QB 1004 (refd)
- Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89 (refd)
- F** *Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394 (folld)
- Clunis v Camden & Islington Health Authority* [1998] QB 978 (refd)
- Cunard & Anor v Antifyre Ltd* [1953] 1 KB 551 (refd)
- East Suffolk Rivers Catchment Board v Kent & Anor* [1941] AC 74 (folld)
- Greenock Corp v Caledonian Railway Co and another appeal* [1917] AC 556 (refd)
- G** *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (refd)
- Hill v Chief Constable of West Yorkshire* [1989] AC 53
- Hubbard v Pitt* [1976] QB 142 (refd)
- Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1 (refd)
- H** *Ooi Han Sun & Anor v Bee Hua Meng* [1991] 3 MLJ 219 (refd)
- Paxhaven Holdings Ltd v Attorney General* (1974) 2 NZLR 185 (refd)
- Punca Klasik Sdn Bhd v Liza James & Ors* [1996] MLJU 315; [1996] 3 CLJ 932 (folld)
- Quinn v Leathem* [1901] AC 495 (refd)
- Shamsudin bin Che Mat & Ors v Datuk Bandar Kuala Lumpur* [2000] 4 MLJ 177 (refd)
- I** *Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313 (folld)

- Skinner v Secretary of State for Transport* The Times, 3 January 1995 (refd) A
- Southport Corporation v Esso Petroleum Co Ltd & Anor* [1954] 2 QB 182 (refd)
- Stovin v Wise, Norfolk County Council (Third Party)* [1996] AC 923 (refd)
- Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (Si mati) & Ors v TP Saffeer & Anor* [1998] 4 CLJ 241 (refd) B
- X and others (minors) v Bedfordshire County Council, M (a minor) and another v Newham London Borough Council and others, E (a minor) v Dorset County Council and other appeals* [1995] 3 All ER 353 (refd) C

Legislation referred to

- Essential (Clearance Of Squatters) Regulations 1969 regs 18, 19, 20
- Federal Capital Act 1960 s 5(1)
- Mental Health Act 1983 s 3
- National Land Code s 425(1)
- Rules of the High Court 1980 O 16 r 2(1)
- Street, Drainage and Building Act 1974 ss 3, 53(1), 54(1), 70(1), (13)

D

Geeta Jothilingam (Matthew Thomas & Co) for the defendant.

Thangaraj Balasundram (Thangaraj & Assoc) for the first proposed third party. E

Abdul Malik Ishak J:

Introduction

This judgment focused on the defendant's notice of appeal to the judge in chambers dated 7 June 2002 as seen in encl 29. F

The parties

Muhamad Saleh bin Hashim, the plaintiff herein, filed a representative action on behalf of himself and 71 other persons named in para 1.1 of the statement of claim. It was not disputed that the plaintiff together with the other 71 persons were and are illegal squatters who had unlawfully erected squatter huts along the river banks of Sungai Klang. While the defendant is said to be a private limited company which carried on the business of general construction. The defendant too is described as the builders for construction works as well as engineers for construction and civil works. G H

Brief facts

Now, at all material times, the defendant was the main contractor of a highway project known as 'Projek Lebuhraya Bertingkat Ampang-Kuala Lumpur (Ampang-Kuala Lumpur Elevated Highway) Di atas Sungai Klang dan Sungai Ampang' ('the highway project'). It was in the course of building this highway project that gave rise to the present civil suit. The I

- A** plaintiff's claim against the defendant was essentially based on negligence. Paragraph 3 of the statement of claim was worded as such:

On 28 March 1999 and on 14 May 1999, Land C suffered flooding. The said floodings were caused by the negligence of the defendant, their servants and/or agents.

- B** And the particulars of negligence were listed as follows:

- C** (a) The defendant, their servants and/or agents brought or caused to be brought onto Land B, heavy machinery and building equipment without taking any steps or any effective steps to prevent the soil on Land B from being washed down into River A and causing the level of Land B to be reduced.
- D** (b) The defendant, their servants and/or agents brought or caused to be brought onto Land B, heavy machinery and building equipment without taking any steps or any effective steps to prevent the soil, debris, mud and silt on Land B from being washed down into River A and causing the level of the bed of River A to rise.
- (c) Causing and/or permitting the level of Land B to be lowered without taking any steps or any adequate steps to prevent the water from the said River A from flowing into Land C through Land B.
- (d) Failed to heed the warnings that the works carried out by the defendant over Land B and River A could result in serious and sudden floods and could cause damage to the plaintiffs.
- E** (e) Failed to take any steps to prevent the water from River A to flow into Land B and continue into Land C.
- (f) Failing to take any steps or any effective steps to ensure that the natural flow of water in River A was not prevented from flowing without obstruction.
- F** (g) Failing to erect any protection barriers between River A, Land B and Land C to prevent the water from River A that flowed into Land B to continue to flow into Land C.

- Basically, the statement of claim showed that the plaintiff together with the other 71 persons were residents of Kampong Bumiputra. The plaintiff's claim was for general and special damages suffered as a result of floods that occurred on 28 March 1999 and 14 August 1999 wherein the plaintiff alleged that those floods were caused by the negligence of the defendant and or the defendant's agents in carrying out works to construct the highway project over the Klang and the Ampang rivers. In the statement of claim too, the plaintiff alleged that the floods were caused by the unnatural use of land and/or nuisance by the defendant.

- I** The statement of defence was filed by the defendant and there the defendant alleged that the floods were not caused by their negligence or that of their agents or by the unnatural use of land or nuisance. In the statement of defence, the defendant, in the alternative, alleged that the floods were caused by the inadequate drainage system which had led to siltation and clogging of the drains which had resulted in the poor flow of water and the rain water too had caused or contributed to the floods.

The legal semantics

A

Alderson B in the case of *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, at p 784 defined negligence in this way:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

B

In *Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1, at p 25, Lord Wright aptly said:

In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

C

The defence of act of God was rejected by the House of Lords in the case of *Greenock Corp v Caledonian Railway Co and another appeal* [1917] AC 556, even though rain fell in 'a heavy, it may be an extraordinary and it may be an unprecedented, spate' (see p 580 of the report).

D

The judicial definition of nuisance is found in the case of *Cunard & Anor v Antifyre Ltd* [1953] 1 KB 551, at pp 556–557 and it is as follows: 'private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property'. According to the case of *Bank of New Zealand v Greenwood* (1984) 1 NZLR 525, at p 532, nuisance is commonly a continuing wrong. It is said that a nuisance may be created not on the land of the defendant but elsewhere (*Paxhaven Holdings Ltd v Attorney General* (1974) 2 NZLR 185). So, a nuisance may be created on a highway adjoining the plaintiff's house (*Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683), or business premises (*Hubbard v Pitt* [1976] QB 142), or even in a navigable river (*Southport Corporation v Esso Petroleum Co Ltd & Anor* [1954] 2 QB 182, at p 204).

E

F

These legal semantics would certainly be expanded in the course of the trial between the plaintiff, on the one hand, and the defendant, on the other.

G

Enclosure 13 — summons for leave to issue third party notice

Meanwhile, upon filing the statement of defence, the defendant had filed the summons for leave to issue third party notice dated 31 May 2001 as seen in encl 13 against the following proposed third parties:

H

- (a) Dewan Bandaraya Kuala Lumpur — henceforth it will be referred to as the 'first proposed third party'; and
- (b) Majlis Perbandaran Ampang Jaya — henceforth it will be referred to as the 'second proposed third party'.

The legal officer attached to the Legal Affairs Department of the Dewan Bandaraya Kuala Lumpur by the name of Nasrul Zaki bin Mohd Yunus affirmed an affidavit in reply on 27 December 2001 as seen in encl 22A and

I

A there he vehemently opposed on behalf of Datuk Bandar Kuala Lumpur ('DBKL') encl 13. In opposing encl 13, DBKL was of the view, inter alia, that the first proposed third party — namely, Dewan Bandaraya Kuala Lumpur, was a non-entity. To be precise, Nasrul Zaki bin Mohd Yunus deposed, at para 4 of encl 22A, the following salient points:

B I would firmly state that the intended first third party is not a legal entity against (whom) the defendant could file a claim.

Now, encl 13 was heard before the learned senior assistant registrar ('SAR') and after hearing the submissions from the solicitors for the defendant and DBKL, encl 13 was dismissed by the learned SAR on 5 June 2002 in so far as it was against the first proposed third party.

C In regard to the second proposed third party, the latter had magnanimously consented to encl 13 on 2 January 2002 and so the third party notice was accordingly issued against the second proposed third party.

D Dissatisfied with the decision of the learned SAR dated 5 June 2002, the defendant filed the notice of appeal to the judge in chambers on 7 June 2002 as seen in encl 29. The present judgment is solely focussed on encl 29.

It is trite law that before leave to issue a third party notice is granted to the defendant as against the first proposed third party, the defendant must show a prima facie case. This principle of law can be distilled from the case of *Punca Klasik Sdn Bhd v Liza James & Ors* [1996] MLJU 315; [1996] 3

E CLJ 932 where at p 936 of the CLJ report, the court said:

Secondly, on the authority of *Furness, Withy & Co Limited v Pickering* (1908) 2 Ch 224, Ungku Aziz must show a prima facie case before leave to issue a third party notice would be issued and he failed to do that.

F This principle of law must be put in the forefront of my mind in the course of deliberating encl 29 which was an offshoot of encl 13.

The main issues

DBKL opposed encl 13 on the following grounds:

- G**
- (i) that the first proposed third party was a non-entity;
 - (ii) being a statutory body and a public authority there was no cause of action against DBKL for damages based on the purported failure of DBKL to exercise its statutory powers;
 - (iii) that the plaintiff's claim against the defendant did not concern DBKL at all; and
 - (iv) that the plaintiff's claim was hinged on illegality.
- H**

I will now examine these issues in quick succession.

The first issue

I By way of encl 13, the defendant sought for the following prayers (in its original Malay text):

minta kebenaran mengeluarkan suatu notis pihak ketiga dan salinannya ada dilampirkan bersama-sama ini.

That would attract and bring into sharp focus O 16 r 2(1) of the Rules of the High Court 1980 ('the RHC') which states as follows: **A**

2 Application for leave to issue third party notice (O 16 r 2)

- (1) Application for leave to issue a third party notice may be made by ex parte summons in Form 24 but the court may direct the summons to be served. **B**

While Form 24 of the RHC is worded as follows:

No 24
SUMMONS FOR LEAVE TO ISSUE A THIRD PARTY NOTICE
(O 16 r 2)

Title as in action **C**

Let all parties concerned attend before the Judge (or Registrar) in Chambers on _____, the _____ day of _____ 20 _____, at _____ for leave to issue a third-party notice a copy of which is attached herewith.

Dated the _____ day of _____, 20 _____

Entered No _____ of 20 _____ **D**

(Seal)

Registrar

This summons is taken out by the defendant (or solicitor for the defendant) of _____
To _____ **E**

The third party notice which was annexed as an exhibit marked as 'WAWM-2' to encl 12 (the affidavit that was affirmed by Wan Azam bin Wan Musa on 31 May 2001 in support of encl 13) was directed at 'Dewan Bandaraya Kuala Lumpur' and not DBKL. In my judgment, Dewan Bandaraya Kuala Lumpur is a non-entity and that the local authority that is in charge of the city of Kuala Lumpur is DBKL. The relevant legislation to refer to would be the Federal Capital Act 1960 particularly s 5(1) thereto. That section enacts as follows: **F**

5 Commissioner to be a body corporate

- (1) The commissioner shall be for all purposes a corporation sole under the name of 'Dato Bandar Kuala Lumpur' or, in English, the 'Commissioner of the City of Kuala Lumpur'. **G**

So, the local authority that should be cited in the third party notice should be DBKL and not Dewan Bandaraya Kuala Lumpur. The DBKL or the Commissioner of the City of Kuala Lumpur, in legislative terms, should be the correct party to be cited in the third party notice. **H**

The next relevant legislation to refer to would be the Street, Drainage and Building Act 1974 ('the Act'). The term 'local authority' is defined in s 3 of the Act as follows:

'local authority' means any city council, municipal council, town council, town board, local council, rural board or similar local authority established by written law and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under s 3 of the Federal Capital Act 1960. **I**

A And so it can be surmised that, in the context of the present case, the relevant local authority would be the Commissioner of the City of Kuala Lumpur or DBKL. It is wrong on the part of the defendant to cite the 'Dewan Bandaraya Kuala Lumpur' in its third party notice because it is not a legal entity known in law and under the law.

B Nasrul Zaki bin Mohd Yunus who affirmed the affidavit in reply in encl 22A on behalf of DBKL made it known, loud and clear, to the whole world at large, so to speak, that the wrong party was cited in the third party notice. For fear of repetition, Nasrul Zaki bin Mohd Yunus averred in encl 22A the following salient points:

- C**
- 3 This Affidavit In Reply is filed on behalf of Datuk Bandar Kuala Lumpur (hereinafter referred to as 'DBKL').
 - 4 I would firmly state that the intended first third party is not a legal entity against (whom) the defendant could file a claim.

But, instead of amending encl 13 by stating DBKL as the correct first proposed third party, the defendant had merely filed an affidavit styled as an affidavit in reply that was affirmed by Wan Azam bin Wan Musa on 8 February 2002 as seen in encl 23 in order to rectify the material defect in encl 13. Wan Azam bin Wan Musa deposed as follows in encl 23:

E

- 5 I refer to para 4 of the Affidavit in Reply and am advised and verily believe that the (proposed) first third party is only a suggestion. In fact, Datuk Bandar Kuala Lumpur ought to be the first named third party and Dewan Bandaraya Kuala Lumpur was named as the first third party due to an oversight/mistake.

F

- 6 I apologize for the mistake on behalf of the defendant and state that the proposed third party Notice and proposed statement of claim by the defendant against the first third party should be against Datuk Bandar Kuala Lumpur. A copy of the proposed third party Notice and (the) proposed statement of claim against Datuk Bandar Kuala Lumpur as the first third party is shown to me and marked as exhs 'WAWM-2a' and 'WAWM-3a' replacing exhs 'WAWM-2' and 'WAWM-3'.

G

- 7 I believe that Datuk Bandar Kuala Lumpur will not be prejudiced by the above proposal as the Summons to Issue third party Notice has been served on Datuk Bandar Kuala Lumpur as acknowledged by the solicitor for Datuk Bandar Kuala Lumpur vide the solicitor's letter from Thangaraj & Associates dated 26 September 2001 which was sent to the solicitors for the defendant. A copy of the said letter dated 26 September 2001 is shown to me and annexed as exh 'WAWM-4'.

H And at para 9 to encl 22A, Nasrul Zaki bin Mohd Yunus deposed as follows:

- 9 I refer to para 6 of the Affidavit in Reply and am advised by the defendant's solicitors and believe that the issue whether the plaintiff has a cause of action is a legal issue which need(s) to be tried.

I In my judgment, no amount of apologies could right the wrong that was done by the defendant in filing encl 13 by stating the wrong first proposed third party. In my judgment, the defendant ought to have filed an

application to amend encl 13 in order to reflect the correct first proposed third party which the defendant was seeking leave to issue. As presently phrased and framed, the defendant is seeking leave to issue the third party notice which is annexed to encl 12 and marked as exh 'WAWM-2' where it stated the proposed third party to be 'Dewan Bandaraya Kuala Lumpur'. So, from all these it can be surmised that despite the express objection on the part of DBKL through Nasrul Zaki bin Mohd Yunus, no steps were taken by the defendant to amend encl 13 and it would be reasonable to hold that it would be an exercise in futility if this court were to grant an order in respect of encl 13 which was directed against a non-entity.

In my judgment, it was not permissible for the defendant to amend the relief sought for in encl 13 by merely filing an affidavit styled as an affidavit in reply as seen in encl 23. The correct procedure would be to file an application to amend encl 13. But, alas, this was never done.

The second issue

English judges have considered the issue of the liability of a public authority to pay damages under the common law. And being prolific, English judges have produced countless judgments on this very interesting issue. It is now my turn to consider the same issue in the context of the facts of the present case.

The proposed third party notice to bring in the first proposed third party as exhibited and marked as exh 'WAWM-3' to encl 12 should be referred to. At para 3 of exh 'WAWM-3' to encl 3, it was stated that (in its original Malay text):

- 3 Pihak Ketiga Pertama ialah dan adalah pada kesemua masa yang material pihak berkuasa tempatan yang mempunyai bidang kuasa untuk mentadbirkan perbandaran Kuala Lumpur di bawah Local Government Act 1976 dan bertanggungjawab untuk upkeep dan penyenggaraan 'maintenance service' jalan awam (public roads) dan lorong-lorong (streets) dan sistem saliran di dalam perbandaran Kuala Lumpur di bawah Street, Drainage and Building Act 1974.

Basically, the defendant's claim for indemnity was based on the grounds that the first proposed third party had contributed to the flooding by failing to take any positive action to maintain the river as provided for under the relevant statutory provisions. The House of Lords had decisively decided the issue of liability of a public authority for its failure to take positive action under a provision of a statute in the case of *Stovin v Wise, Norfolk County Council (Third Party)* [1996] AC 923. The facts in *Stovin's* case may be stated as follows. On 11 December 1988, as the plaintiff — Mr Stovin, was riding his motorcycle along Station Road, he was knocked off his motorcycle by a car turning right out of Cemetery Road and that car was driven by the defendant by the name of Mrs Wise. The plaintiff's claim against the defendant for damages for his personal injuries was settled but the defendant joined the Norfolk County Council as a third party, alleging negligence and breach of duty. Judge Crawford QC, sitting as a judge of the High Court, held that the Norfolk County Council was not in breach of

A statutory duty since the land was not part of the highway, but the learned judge held that the Norfolk County Council was in breach of its common law duty of care and was 30% to blame for the plaintiff's injuries. The Court of Appeal, comprising of Nourse, Kennedy and Roch LJJ, dismissed the appeal by the Norfolk County Council. Being aggrieved, the Norfolk County Council then appealed to the House of Lords with a coram of Lord

B Goff of Chieveley, Lord Jauncey of Tullichettle, Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Hoffmann. In allowing the appeal by the Norfolk County Council, the House of Lords held (Lord Slynn of Hadley and Lord Nicholls of Birkenhead dissenting) that the question of whether the existence of a statutory power gave rise to a common law duty

C of care required an examination of the policy of the statute; that the absence of a statutory duty would normally exclude the existence of a common law duty of care; and that, accordingly, the minimum pre-conditions for basing a duty of care on a statutory power were, first, that it would have been irrational not to have exercised the power so that there was in effect a public law duty to act, and secondly, that there were exceptional grounds for

D holding that the policy of the statute required compensation to be paid to persons who suffered loss because the power was not exercised. The House of Lords also held that since it was within the council's discretion to decide whether anything should be done about the junction and it was under no public law duty to act, the first condition was not satisfied; and that the second condition was not satisfied too since there were no grounds on

E which it could be said that the council's public law duty should give rise to an obligation to compensate persons who had suffered loss by reason of its non-performance; and that, accordingly, the council owed the plaintiff no duty of care and the defendant's claim failed.

F So the House of Lords reversed the decision of the Court of Appeal which was reported in (1994) 1 WLR 1124; (1994) 3 All ER 467. It must be borne in mind that the sole question for the House of Lords to deliberate was this: whether the council owed the plaintiff any common law duty in respect of its failure to take action? It must also be borne in mind that Judge Crawford QC had found that the Norfolk County Council had known that the junction was dangerous and had been negligent in not taking steps to

G make it safer.

H A distinction was made in regard to the liability of a public authority to take care when embarking on a course of conduct whereby that public authority must take care not to create a risk of danger with those matters where no positive action was taken to protect others from harm. Lord Hoffmann who delivered the majority judgment in the *Stovin's* case had aptly decided the case based on a number of principles. At p 952 of the report, Lord Hoffmann had this to say:

I There are many instances of this principle being applied to statutory duties, but perhaps the most relevant example of the dissociation between public duty and a liability to pay compensation for breach of that duty was the ancient common law duty to repair the highway. The common law imposed this financial burden upon the inhabitants of the parish. But it saw no need to impose upon them the additional burden of paying compensation to users of

the highway who suffered injury because the highway surveyor had failed to repair. The duty could be enforced only by indictment. This rule continued to apply when the duty to maintain was transferred by statute to highway authorities and was only abolished by s 1 of the Highways (Miscellaneous Provisions) Act 1961. Likewise in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 it was held that the public duty of the police to catch criminals did not give rise to a duty of care to a member of the public who was injured because the police had negligently failed to catch one. The decision was mainly based upon the large element of discretion which the police necessarily have in conducting their operations, but the judgment excludes liability even in cases in which the alleged breach of duty would constitute public law irrationality.

A

B

In terms of public finance, this is a perfectly reasonable attitude. It is one thing to provide a service at the public expense. It is another to require the public to pay compensation when a failure to provide the service has resulted in loss. Apart from cases of reliance, which I shall consider later, the same loss would have been suffered if the service had not been provided in the first place. To require payment of compensation increases the burden in public funds. Before imposing such an additional burden, the courts should be satisfied that this is what Parliament intended.

C

D

And at p 953 of the report, Lord Hoffmann remarked:

In the case of a mere statutory power, there is the further point that the legislature has chosen to confer a discretion rather than create a duty. Of course there may be cases in which Parliament has chosen to confer a power because the subject matter did not permit a duty to be stated with sufficient precision. It may nevertheless have contemplated that in circumstances in which it would be irrational not to exercise the power, a person who suffered loss because it had not been exercised, or not properly exercised, would be entitled to compensation. I therefore do not say that a statutory 'may' can never give rise to a common law duty of care. I prefer to leave open the question of whether the *Ann*s case was wrong to create any exception to Lord Romer's statement of principle in the *East Suffolk* case and I shall go on to consider the circumstances (such as 'general reliance') in which it has been suggested that such a duty might arise. But the fact that Parliament has conferred a discretion must be some indication that the policy of the Act conferring the power was not to create a right to compensation. The need to have regard to the policy of the statute therefore means that exceptions will be rare.

E

F

G

In summary, therefore, I think that the minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.

H

Finally, at p 958 of the report, Lord Hoffmann concluded:

In my view the creation of a duty of care upon a highway authority, even on grounds of irrationality in failing to exercise a power, would inevitably expose the authority's budgetary decisions to judicial inquiry. This would distort the priorities of local authorities, which would be bound to try to play safe by

I

- A** increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services. I think that it is important, before extending the duty of care owed by public authorities, to consider the cost to the community of the defensive measures which they are likely to take in order to avoid liability. It would not be surprising if one of the consequences of the *Anns* case and the
- B** spate of cases which followed was that local council inspectors tended to insist upon stronger foundations than were necessary. In a case like this, I do not think that the duty of care can be used as a deterrent against low standards in improving the road layout. Given the fact that the British road net work largely antedates the highway authorities themselves, the court is not in a position to say what an appropriate standard of improvement would be. This must be a
- C** matter for the discretion of the authority. On the other hand, denial of liability does not leave the road user unprotected. Drivers of vehicles must take the highway network as they find it. Everyone knows that there are hazardous bends, intersections and junctions. It is primarily the duty of drivers of vehicles to take due care. And if, as in the case of Mrs Wise, they do not, there is compulsory insurance to provide compensation to the victims. There is no
- D** reason of policy or justice which requires the highway authority to be an additional defendant. I would therefore allow the appeal.

In my judgment, applying the speech of Lord Hoffmann in *Stovin's* case, the purported duty imposed on the first proposed third party by the defendant was entirely without any basis whatsoever for the following reasons:

- E** (1) the plaintiff together with the other 71 others that were named in the statement of claim were illegal squatters and they still remained as such and these illegal squatters had illegally erected squatter huts on the river banks of Sungai Klang;
- F** (2) the plaintiff together with the other 71 others who had constructed the squatter huts had contravened the following provisions of the legislations:
- (i) s 425(1) of the National Land Code which enacts as follows:
- 425 Unlawful occupation, etc, of State land, reserved land or mining land
- G** (1) Any person who, without lawful authority —
- (a) occupies, or erects any building on, any State land, reserved land or mining land, or
- (b) clears, ploughs, digs, encloses or cultivates any such land or part thereof; or
- (c) cuts or removes any timber or produce on or from such land,
- H** shall be guilty of an offence, and liable on conviction to a fine not exceeding ten thousand ringgit, or imprisonment for a term not exceeding one year.
- (ii) s 70(1) of the Act which enacts as follows:
- 70 Notice of new buildings
- I** (1) No person shall erect any building without the prior written permission of the local authority.
- (iii) s 70(13) of the Act which enacts as follows:

70(13) Any person who —

A

- (a) commences or resumes the erection of a building in contravention of sub-s (9);
- (aa) commences the erection of a building in contravention of sub-s (9A);
- (b) deviates from any plan or specification approved by the local authority without the prior written permission of the local authority;
- (c) erects a building in contravention of this Act or of any of the by-laws made thereunder; or
- (d) fails to comply with any lawful order or written direction of the local authority or with any term or condition attached by the local authority to any modification or waiver of any of the requirements of any by-law,

B

shall be liable on conviction to a fine not exceeding ten thousand ringgit and shall also be liable to a further fine of two hundred and fifty ringgit for every day during which the offence is continued after conviction.

C

(iv) regs 18, 19 and 20 of the Essential (Clearance Of Squatters) Regulations 1969 state as follows:

18 Constructing or selling a squatter hut an offence

D

- (1) Any person who —
 - (a) erects; or
 - (b) sells or offers for sale

any squatter hut on any land is guilty of an offence and shall on conviction be liable to a fine not exceeding \$1,000 or to a term of imprisonment not exceeding 6 months or to both.

E

(2) For the purpose of this regulation any person who places or assembles any material (which may be used for the erection of a squatter hut) on the land shall be deemed until the contrary is proved to be erecting a squatter hut.

19 Attempting and abetting

F

Any person who attempts to commit or abets the commission of any offence under these Regulations shall on conviction be liable to a fine not exceeding \$1,000 or to a term of imprisonment not exceeding 6 months or to both.

20 Effect of these Regulations

The provisions of these Regulations shall have effect notwithstanding anything inconsistent therewith contained in any written law.

G

- (3) that DBKL, being a statutory body, must act pursuant to the provisions of the relevant statute;
- (4) that there is no prevailing provision of the law for DBKL to act in such a manner as to ensure that flood does not cause damage to illegal squatter huts that were erected by illegal squatters along the river banks of Sungai Klang;
- (5) that DBKL do not owe any duty to the illegal squatters to perform any act in order to ensure that the illegal squatter huts erected by the illegal squatters and the belongings of the illegal squatters which are in the illegal squatter huts are not damaged by flood.

H

I

The facts of the present case leaned in favour of DBKL. There was no basis whatsoever for the plaintiff to file encl 13 to include the first proposed third

- A party who had no legal entity at all. There was also no basis at all for the plaintiff to seek by a round about way to include DBKL as a third party without amending encl 13 by stating that DBKL being the correct first proposed third party. It was insufficient for the plaintiff to file encl 23 in order to rectify the material defect in encl 13. Be that as it may, it was part and parcel of my judgment that DBKL do not owe any duty to the plaintiff and to the other 71 other illegal squatters and neither was DBKL liable to them as they are squatters simpliciter. DBKL was blameless and cannot be held liable to these illegal squatters in damages.

- I must now proceed to examine the case of *East Suffolk Rivers Catchment Board v Kent & Anor* [1941] AC 74 (HL). In that case owing to a very high tide a breach was made in a sea wall and as a consequence of which the respondents' land was flooded. The appellants in the exercise of their statutory powers undertook the repair of the wall, but they carried out the work so inefficiently that the flooding continued for 178 days and thereby causing serious damage to the respondents' pasture land. It appeared from the evidence that by the exercise of reasonable skill the breach in the wall might have been repaired in 14 days. The House of Lords held, by a majority comprising of Viscount Simon LC, Lord Thankerton, Lord Romer and Lord Porter with Lord Atkin dissenting, that the appellants being under no obligation to repair the wall or to complete the work after having begun it, were under no liability to the respondents, the damage suffered by them being due to natural causes. Viscount Simon LC, at pp 85–86 of the report aptly said:

- In order that the respondents should succeed in this action, it is necessary that they should establish, not only that the appellants were wanting in care and skill when exercising their statutory powers, but that they inflicted injury and loss upon the respondents by their negligence. Lord Parker thus states the proposition in *Great Central Ry v Hewlett* [1916] 2 AC 511, 519: 'It is undoubtedly a well-settled principle of law that when statutory powers are conferred, they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered.' In the present case the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature which the appellants, albeit unskilfully, were endeavouring to counteract. Supposing, for example, that after the appellants had made their first unsuccessful attempt they had decided to abandon their efforts altogether, the respondents could have had no legal claim against them for withdrawing, even though the result might have been to leave the respondents' land indefinitely flooded. This shows, I think, how different is the relation between the Catchment Board and individual owners or occupiers like the respondents, and the relation between a contractor employed by the respondents to mend the wall. In the latter case the respondents would have a remedy in damages if the contractor did not exercise reasonable skill and promptness in discharging his task and if damage resulted. But in the former case the Catchment Board has its responsibilities over the whole of its area to consider; it may be that in its judgment it is necessary to use its skilled staff in mending other breaches; it may be that the outlay involved in making a good job of one particular repair is more than its

limited finances would permit. Part IV of the Land Drainage Act contains financial provisions. Without setting these out at length, it is sufficient to say that the expenses of the Catchment Board are met by the issue of precepts to the County Council and, it may be, to certain other local bodies, but that the statute puts limits to the amounts thus raised. du Parc LJ in his dissenting judgment, points out that when Parliament has left it to the public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, this may raise 'a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift'.

In allowing the appeal by the statutory authority, Viscount Simon LC, remarked at pp 87–88 of the report:

Moreover, as Scrutton LJ has pointed out in *Sheppard v Glossop Corp* [1921] 3 KB 132, 149 Lord Blackburn's passage must be read in the context in which it was pronounced. I agree with du Parc LJ that it would be misapplied if it were supposed to support the proposition that a public body, which owes no duty to render any service, may become liable at the suit of an individual, if once it takes it upon itself to render some service, for failing to render reasonably adequate and efficient service. On the other hand, if the public body by its unskilful intervention created new dangers or traps, it would be liable for its negligence to those who suffered thereby. Scrutton LJ in *Sheppard v Glossop Corp* [1921] 3 KB 132, 149 has a passage which makes the same distinction. That case was concerned with a local authority upon which Parliament had conferred a discretionary power of lighting. 'If they do light,' said the learned Lord Justice, 'they will be liable in damages for negligence in lighting; negligence in allowing gas or electricity to escape; negligence in putting posts in a highway without warning; and negligence in placing traps and dangers in the streets and not lighting them at night. But they are not liable merely because in the exercise of their discretion they do not light, or because they discontinue lighting, [for] dangers which they have not themselves created.'

These considerations lead to the conclusion that the respondents' claim is ill-founded. They have suffered damage by the flooding of their land during four months or more. They seek to recover compensation from the appellants for all of this loss except the first fortnight. But the appellants did not cause the loss; it was caused by the operations of nature which the appellants were endeavouring, not very successfully, to counteract. It is admitted that the respondents would have no claim if the appellants had never intervened at all. In my opinion, the respondents equally have no claim when the appellants do intervene, save in respect of such damage as flows from their intervention and as might have been avoided if their intervention had been more skilfully conducted.

In my opinion, therefore, the appeal should be allowed.

While Lord Romer, writing a separate judgment, made a distinction between power conferring statutes and statutes which impose a duty and his Lordship observed that (see pp 97–98 of the report):

My Lords, it has been laid down time and again that, in exercising a power that has been conferred upon it, a statutory authority is under an obligation not thereby (ie, by the exercise of the power) to inflict upon others any damage that may be avoided by reasonable care. But I know of no authority for the

- A proposition that in selecting the time within which, the extent to which, and the method by which its statutory power is to be exercised it owes any duty whatsoever. There is, indeed, as I will point out later on, a decision of the Court of Appeal in England that is inconsistent with such a proposition. And yet this is the proposition that is involved in the respondents' contention in the present case. They allege, and for myself I think that they have proved, that
- B the appellants, until they eventually embarked upon the construction of the V-shaped dam, selected a method of repairing the respondents' wall which, in view of the labour and materials at their disposal, was one that no reasonable man would have adopted. The result was that the sea water continued to flow through the breach in the wall and that the respondents' marshland continued to be flooded for a longer time than would have been the case had the appellants acted more reasonably; and I will assume that by reason of this the respondents suffered material damage. Now, had the Land Drainage Act, 1930, imposed upon the appellants the duty of repairing the wall instead of merely conferring upon them the power of doing so, they could without question have been made liable for this damage. For they would in that case have been under the obligation of effecting the repair with all reasonable skill and diligence, and they would have committed a breach of such obligation had there been any unreasonable delay in effecting the repair, whether such delay was due to an unreasonable time being taken in beginning the work or in the course of carrying it out or to their having adopted an unreasonable method of repair. But the Act imposed upon the appellants no duty of repairing the wall. It merely gave them the power of doing so.
- C
- D It would not be out of place to refer to two cases which discussed the liabilities of public authorities. The first case would be that of *X and others (minors) v Bedfordshire County Council*, *M (a minor) and another v Newham London Borough Council and others*, *E (a minor) v Dorset County Council and other appeals* [1995] 3 All ER 353 (HL). The other case would be that of *Clunis v Camden & Islington Health Authority* [1998] QB 978, Court of Appeal. In the first case, I will refer to the judgment of Lord Browne-Wilkinson whose judgment was agreed to by Lord Jauncey of Tullichettle, Lord Lane, Lord Ackner and Lord Nolan. In a long judgment, his Lordship Lord Browne-Wilkinson examined the brief facts and set out the law in these salient words (see pp 363–365 of the report):
- E
- F My Lords, in each of these five appeals the plaintiffs by their statements of claim allege they have been injured by public authorities in the carrying out of functions imposed upon them by statute. The defendants have applied to strike out the claims on the grounds that they disclose no cause of action. In the first group of appeals (the *Bedfordshire and Newham* cases), the allegations are that the public authorities negligently carried out, or failed to carry out, statutory duties imposed on them for the purpose of protecting children from child abuse. In the second group (the *Dorset*, *Hampshire* and *Bromley* cases), the plaintiffs allege that the local authorities failed to carry out duties imposed upon them as education authorities by the Education Acts 1944 to 1981 in relation to children with special educational needs.
- G
- H Although each case is different, all of them raise in one form or another the difficult and important question to what extent authorities charged with statutory duties are liable in damages to individuals injured by the authorities' failure properly to perform such duties. Such liability may be alleged to arise in a number of different ways: it can be based on breach of statutory duty
- I

simpliciter, on the failure to carry out the statutory duty without due care or on a breach of a common law duty of care. In considering the decided cases, and consequently the argument submitted on these appeals, it is not always clear which basis of liability is under consideration. I therefore propose, before turning to the individual appeals, to attempt a more general analysis of the problems raised in this field so far as they affect these cases.

GENERAL APPROACH

Introductory – public law and private law

The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority. It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action. The distinction is important because a number of earlier cases (particularly in the field of education) were concerned with the enforcement by declaration and injunction of what would now be called public law duties. They were relied on in argument as authorities supporting the plaintiffs' claim for damages in this case: I will consider them in a little more detail later.

Private law claims for damages can be classified into four different categories, viz: (A) actions for breach of statutory duty simpliciter (ie irrespective of carelessness); (B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; (C) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; and (D) misfeasance in public office, ie the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful.

Category (D) is not in issue in this case. I will consider each of the other categories but I must make it clear that I am not attempting any general statement of the applicable law: rather, I am seeking to set out a logical approach to the wide ranging arguments advanced in these appeals.

(A) Breach of statutory duty simpliciter

This category comprises those cases where the statement of claim alleges simply (i) the statutory duty, (ii) a breach of that duty, causing (iii) damage to the plaintiff. The cause of action depends neither on proof of any breach of the plaintiffs' common law rights nor on any allegation of carelessness by the defendant.

The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to

- A which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: see *Cutler v Wandsworth Stadium Ltd* [1949] 1 All ER 544, [1949] AC 398 and *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456, [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v Lord Wimborne* [1898] 2 QB 402, [1895–9] All ER Rep 147.
- B
- C

- Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, ie bookmakers and prisoners: see *Cutler v Wandsworth Stadium Ltd* and *Hague v Deputy Genemor of Parkhurst Prison* [1991] 3 All ER 733, [1992] 1 AC 58. The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions
- D
- E
- F

(B) *The careless performance of a statutory duty – no common law duty of care*

- G This category comprises those cases in which the plaintiff alleges: (i) the statutory duty; and (ii) the ‘negligent’ breach of that duty but does not allege that the defendant was under a common law duty of care to the plaintiff. It is the use of the word ‘negligent’ in this context which gives rise to confusion: it is sometimes used to connote mere carelessness (there being no common law duty of care) and sometimes to import the concept of a common law duty of care. In my judgment it is important in considering the authorities to distinguish between the two concepts: as will appear, in my view the careless performance of a statutory duty does not in itself give rise to any cause of action in the absence of either a statutory right of action (category (A) above) or a common law duty of care (category (C) below).
- H

Proceeding further, Lord Browne-Wilkinson remarked at p 367 of the report:

I

In my judgment the correct view is that in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff

has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient.

(C) *The common law duty of care*

In this category, the claim alleges either that a statutory duty gives rise to a common law duty of care owed to the plaintiff by the defendant to do or refrain from doing a particular act, or (more often) that in the course of carrying out a statutory duty the defendant has brought about such a relationship between himself and the plaintiff as to give rise to a duty of care at common law. A further variant is a claim by the plaintiff that, whether or not the authority is itself under a duty of care to the plaintiff, its servant in the course of performing the statutory function was under a common law duty of care for breach of which the authority is vicariously liable.

His Lordship Lord Browne-Wilkinson continued to say at p 368 of the report:

(1) *Co-existence of statutory duty and common law duty of care*

It is clear that a common law duty of care may arise in the performance of statutory functions. But a broad distinction has to be drawn between: (a) cases in which it is alleged that the authority owes a duty of care in the manner in which it exercises a statutory discretion; and (b) cases in which a duty of care is alleged to arise from the manner in which the statutory duty has been implemented in practice.

An example of (a) in the educational field would be a decision whether or not to exercise a statutory discretion to close a school, being a decision which necessarily involves the exercise of a discretion. An example of (b) would be the actual running of a school pursuant to the statutory duties. In such latter case a common law duty to take reasonable care for the physical safety of the pupils will arise. The fact that the school is being run pursuant to a statutory duty is not necessarily incompatible with a common law duty of care arising from the proximate relationship between a school and the pupils it has agreed to accept. The distinction is between (a) taking care in exercising a statutory discretion whether or not to do an act and (b) having decided to do that act, taking care in the manner in which you do it.

(2) *Discretion, justiciability and the policy/operational test*

(a) Discretion

Most statutes which impose a statutory duty on local authorities confer on the authority a discretion as to the extent to which, and the methods by which, such statutory duty is to be performed. It is clear both in principle and from the decided cases that the local authority cannot be liable in damages for doing that which Parliament has authorized. Therefore if the decisions complained of fall within the ambit of such statutory discretion they cannot be actionable in common law. However, if the decision complained of is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority, there is no a priori reason for excluding all common law liability.

At pp 369–370 of the report, Lord Browne-Wilkinson said:

It follows that in seeking to establish that a local authority is liable at common law for negligence in the exercise of a discretion conferred by statute, the first requirement is to show that the decision was outside the ambit of the

A discretion altogether: if it was not, a local authority cannot itself be in breach of any duty of care owed to the plaintiff.

B In deciding whether or not this requirement is satisfied, the court has to assess the relevant factors taken into account by the authority in exercising the discretion. Since what are under discretion are discretionary powers conferred on public bodies for public purposes the relevant factors will often include policy matters, for example social policy, the allocation of finite financial resources between the different calls made upon them or (as in the *Dorset Yacht* case) the balance between pursuing desirable social aims as against the risk to the public inherent in so doing. It is established that the courts cannot enter upon the assessment of such 'policy' matters. The difficulty is to identify in any particular case whether or not the decision in question is a 'policy' decision.

C

And then at p 371 of the report, Lord Browne-Wilkinson said:

D From these authorities I understand the applicable principles to be as follows. Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion: nothing which the authority does within the ambit of the discretion can be actionable at common law. If the decision complained of falls outside the statutory discretion, it can (but not necessarily will) give rise to common law liability. However, if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist.

E

Further down the same page, Lord Browne-Wilkinson remarked:

F Similarly, in my judgment, a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be consistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.

G In regard to the other case — namely the case of *Chumis*, the facts may be stated as follows. That was the case where the plaintiff, who had a history of mental disorder, was discharged from hospital on 24 September 1992 after having been detained under s 3 of the Mental Health Act 1983. He was subject to after-care by the defendant health authority under s 117 of the said Act but failed to attend appointments arranged by the responsible medical officer. On 17 December 1992, in a sudden and unprovoked attack, he killed a man by stabbing him. The plaintiff pleaded guilty to manslaughter on the grounds of diminished responsibility and was ordered to be detained in a secure hospital. He brought an action against the defendant claiming that he had suffered injury, loss and damage and that the defendant was in breach of a common law duty to treat him with reasonable professional care and skill that on the known information the responsible medical officer should have realized that he was in urgent need of treatment and was dangerous, and that, had he been given treatment, he would not have committed manslaughter and would not have been subject to the prolonged detention which he faced. The judge refused to strike out the action, holding that the plaintiff was not precluded from recovering

I

damages consequent on his own criminal act. The defendant then filed an appeal and the Court of Appeal comprising of Beldam and Potter LJJ, and Bracewell J, allowed the appeal and held that the rule of public policy that a plaintiff should not be able to rely on his own criminal or immoral act was not confined to particular causes of action; that public policy only required a court to deny its aid to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and sought to rely on the illegal act in putting forward his case, and the operation of the policy was restricted to those who were presumed to have known that what they had been doing was unlawful; that acceptance of a plea of diminished responsibility did not remove the plaintiff's responsibility for his criminal act; and that, accordingly, since his claim arose out of his commission of a criminal offence, and since he had to be taken to have known what he was doing and, despite the reduction in his culpability by reason of his mental disorder, that it was wrong, the court was precluded from entertaining his claim. The Court of Appeal also held that the primary method of enforcing the after-care obligations under s 117 of the Mental Health Act 1983 was by complaint to the Secretary of State; that the wording of s 117 of the said Act was not apposite to create a private law cause of action for failure to carry out duties imposed by the Statute, and Parliament could not be supposed to have intended to create such an extensive and wide-ranging liability for breaches of responsibility under s 117 of the said Act; that in deciding whether a common law duty existed in parallel with statutory obligations, and whether it would be fair and reasonable to impose such a duty, the surrounding statutory framework was a major consideration; that the duty of care under s 117 of the said Act was different in nature from that normally owed by a doctor to a patient; and that, in all the circumstances, the plaintiff could not establish a cause of action arising from the failure by the defendant or the responsible medical officer to carry out their functions under s 117 of the said Act, nor would it be fair or reasonable to hold the defendant liable for such a failure. Beldam LJ delivering the judgment of the Court of Appeal said at p 986 of the report:

Is the plaintiff's action barred on grounds of public policy?

Mr Irwin submitted that the rule of policy embraced by the Latin maxim *ex turpi causa non oritur actio* does not apply to causes of action founded in tort and that the plaintiff's cause of action does not arise from the manslaughter of Mr Zito. Of this maxim Lindley LJ in *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, 728 said:

'This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him'.

A Continuing further and at p 987 of the report, his Lordship Beldam LJ said:

But whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts. As Best CJ said in *Adamson v Jarvis* (1827) 4 Bing 66, 72–73:

B ‘From the inclination of the court on this last case, and from the concluding part of Lord Kenyon’s judgment in *Merryweather v Nixon* (1799) 8 Durn & E 186, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.’

C Rounding up the matter, Beldam LJ remarked at p 990 of the report:

D In the present case we consider the defendant has made out its plea that the plaintiff’s claim is essentially based on his illegal act of manslaughter, he must be taken to have known what he was doing and that it was wrong, notwithstanding that the degree of his culpability was reduced by reason of mental disorder. The court ought not to allow itself to be made an instrument to enforce obligations alleged to arise out of the plaintiff’s own criminal act and we would therefore allow the appeal on this ground.

I pause here for a moment. I need to take stock of the situation. It must be recalled that Lord Hoffmann in the Stovin’s case had adopted a very restrictive approach thereby closing the door to an action in negligence against a public authority for failure to exercise a statutory power. Lord Hoffmann asserted that where a public authority was sued in negligence over its failure to exercise a statutory power, there could only be an action in negligence on the basis of undertaking and reliance provided two conditions were met. Firstly, that it was so irrational not to have exercised the statutory power that there would be a duty to act under public law principles — in reference to the Wednesbury ‘unreasonableness’ test as propounded in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. Secondly, that there were ‘exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised’ (see p 956 of the report). Lord Hoffmann further observed that even in cases where the local authority’s allegedly negligent conduct related to a statutory duty where Parliament had given it no choice over whether to act, a private right to sue for breach of that duty did not automatically arise. In such a case, Lord Hoffmann was of the view that the availability of a private cause of action had to depend on whether that was the intention of Parliament. So, Lord Hoffmann reasoned that the fact that Parliament had only seen it fit to impose such a power made it even less likely that it would have intended a common law duty to be recognized. At first blush, the approach of Lord Hoffmann appears to be at odds with the decision of the House of Lords in *X and others (minors) v Bedfordshire County Council*, *M (a minor) and another v Newham London Borough Council and others*, *E (a minor) v Dorset County Council and other appeals* which expressly seek to countenance some actions in negligence in regard to statutory powers in the realm of

education notwithstanding the absence of Parliamentary intention that such an action should lie. These would constitute my observations but perhaps the best method of reconciling the two decisions would be to adopt the following stand: that Lord Hoffmann's reasoning merely represents the court's determination to deny the existence of a duty of care where the allegation revolves on the issue of pure omission where there is a failure to exercise a statutory power.

Public authorities are certainly protected from negligence suits. For instance, in the case of *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL), the court protected the police from a negligence suit. In that case, the mother of a serial killer's final victim sued the police in negligence for its failure to apprehend the killer earlier. The House of Lords held, inter alia, that the police owed no duty to an individual member of the public in such circumstances because, in the absence of evidence to the contrary, their crime preventing function was directed to members of the public at large. The courts also held in *Alexandrou v Oxford* [1993] 4 All ER 328 (CA); in *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004 (CA); and in *Skinner v Secretary of State for Transport* The Times, 3 January 1995, that the police, the fire brigade and the coastguard respectively owed no duty of care in failing to respond to an emergency call.

So it can be surmised that based on the authorities as alluded to earlier, DBKL would not be liable for damages to the plaintiff or even to the defendant for the alleged negligence. DBKL too owes no duty of care to the plaintiff or to the defendant as alleged in the proposed third party notice. It must be emphasized that there is no obligation on the part of DBKL as a public authority which is solely governed by the provision of statutes to spend and expend public funds to alleviate the flood problems so that the illegal squatters who had erected their squatter huts illegally on river banks would not be affected by flood. Incidentally, there is also no provision of the law which stipulates that DBKL is to ensure that squatter huts erected illegally by squatters would not be affected by flood. I must at once say that it is the duty of the defendant to disclose under which statutory provision the defendant is relying upon where it categorically imposes a duty on DBKL to take the necessary and immediate actions to ensure that the squatter huts and the belongings of the plaintiff together with the other 71 persons are not damaged by flood. To date, none had been shown by the defendant. But when challenged, the defendant rose to the occasion and now the defendant relied on s 53(1) and s 54(1) of the Act and said that it was the breach of the aforesaid provisions that had caused or contributed to the floods. That being the case, it would be ideal to refer to the relevant passage that appears in the case of *Stovin* where Lord Hoffmann sets out the pre-conditions 'for basing a duty of care upon the existence of a statutory power' (see p 953 between lines 'D'-'E' of the report). I have earlier reproduced this very passage and I must be forgiven for repeating that passage once again. Lord Hoffmann lucidly set out two pre-conditions and they may be stated as follows (for this purpose, I must reproduce once again in verbatim the speech of Lord Hoffmann that appears at p 953 of the report):

- A first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.
- B It can never be denied that the defendant had failed to satisfy both the conditions as stipulated in the *Stovin's* case. In my judgment, it was not irrational not to have exercised the power to alleviate the flood problems faced by the illegal squatters who were, in the first place, persons who ought not to have been on the said land. Furthermore, from the particulars of negligence that were set out in the statement of claim it was clearly evident
- C that the flood was caused by the danger that was created by the defendant. A germane observation ought to be made in regard to ss 53(1) and 54(1) of the Act and that would be this. That these sections do not require nor stipulate the requirement of the payment of compensation. It would do justice to reproduce these two sections and I will do so now:
- D 53(1)The local authority shall maintain and keep in repair and, as it sees fit, enlarge, alter, arch over or otherwise improve all or any of the surface and storm water drains, culverts, gutters, and water-courses under the control of the local authority and may discontinue, close up or destroy such of them as it deems useless or unnecessary:
- E Provided that the local authority shall before entering any private property for the purpose of carrying out any work under this subsection, give reasonable notice in writing in that behalf, and shall in carrying out such works do as little damage as may be and shall make full compensation for any damage done.
- F 54(1)The local authority shall cause the surface and storm water drains, culverts, gutters and water-courses under the control of the local authority to be so constructed, maintained and kept as not to be a nuisance or injurious to health and to be properly cleared, cleansed and emptied and, for the purpose of flushing, cleansing and emptying the same, it may construct and place, either above or under ground, such reservoirs, sluices, engines and other work as are necessary:
- G Provided that the local authority shall, before entering any private property for the purpose of carrying out any work under this subsection, give reasonable notice in writing in that behalf, and shall in carrying out such work do as little damage as may be and shall make full compensation for any damage done.
- H In any event, the House of Lords in the *Stovin's* case had categorically stated that it would not be proper to 'expose the authority's budgetary decisions to judicial inquiry' (per Lord Hoffmann at p 958 at line 'B' of the report). I would gratefully adopt the approach of Lord Hoffmann in *Stovin's* case and hold that the local authorities in Malaysia should not be exposed to suits framed in negligence for the benefit of illegal squatters like the present plaintiff and the other 71 persons who were residents of Kampung
- I Bumiputra. The public finance of the local authorities in Malaysia must not, in the context of the present case, be subjected to 'judicial inquiry'. Put in another way, DBKL should not be exposed to enormous financial

liabilities to be paid from public funds to the illegal squatters who built their illegal squatter huts along the river banks of Sungai Klang. In my judgment, ss 53(1) and 54(1) of the Act read together with the case of *Stovin* and the case of *East Suffolk Rivers Catchment Board v Kent & Anormade* it clear that even a lawful owner of a land whose premise is affected by flood cannot file a proceeding against DBKL for damages. The stand of DBKL was very clear. That as against a legal land owner, DBKL does not owe a duty of care nor is DBKL liable to pay damages in the event of a flood. A fortiori DBKL cannot be held to be liable to pay damages for the consequences of the flood nor be held to owe a duty of care to illegal squatters like the present plaintiff and his 71 friends. I must at once say that DBKL did not say that they or for that matter any local authority are immune from legal proceedings. Indeed, the submission of DBKL was premised on the fact that in the present case there was no provision of law to say that DBKL was legally bound to ensure that public funds are expended to prevent flood from flooding the squatter huts that were illegally erected by the plaintiff and his 71 compatriots. In my judgment, any attempt to draw an analogy from the case of *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors* and other appeals [2003] 1 MLJ 567 (CA) — the Highland Tower case, with that of the present case must, to say the least, tantamount to stretching the legal limits to its very extreme end. At any rate, it must be borne in mind that every judgment must be read as applicable to the particular facts of the case. Lord Halsbury in *Quinn v Leathem* [1901] AC 495 aptly said at p 506 that:

... every judgment must be read as applicable to the particular facts proved, ... since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found ... a case is only an authority for what it actually decides.

This very passage was vigorously applied by Edgar Joseph Jr SCJ in the case of *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 and by Mohamed Azmi SCJ in the case of *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89.

At any rate, the Court of Appeal in *Stephen Phoa's* case had explicitly categorized the duties of the local authority on the issue of failing to act and the issue of 'creating a danger' into different compartments. In regard to the issue of the duty to act, the Court of Appeal in *Stephen Phoa's* case remarked at p 616 of the report:

Now, assuming that there was a duty on the fourth defendant to act in a particular manner towards the property of the plaintiffs post collapse, such duty must find its expression in public and not private law. Accordingly, if there had been a failure on the part of the 4th defendant to do or not to do something as a public authority, the proper method is to proceed by way of an application for judicial review. See, *Trustees of the Dennis Rye Pension Fund & Anor v Sheffield City Council* [1997] 4 All ER 747. Further, the substance of the order made against the fourth defendant appears to demand constant supervision and though this may no longer be a complete bar to the grant of a mandatory order, it is nevertheless a relevant consideration that must be kept

A in the forefront of the judicial mind. In the circumstances of this case, we are unable to see how such a duty as alleged to exist may be enforced in private law proceedings. It follows that this part of the judge's judgment cannot stand. It is set aside.

B Whereas in the present case, the issue that was raised by the defendant against DBKL was in respect of the failure on the part of DBKL to act pursuant to ss 53(1) and 54(1) of the Act. Assuming for the moment that there was such a duty as alleged by the defendant, 'such duty must find its expression in public and not private law.' The Court of Appeal in *Stephen Phoa's* case found the local authority there liable and said at p 617 of the report:

C This is a case where a danger was expressly created at the instance of the fourth defendant.

D Whereas in the present case, there was no allegation whatsoever emanating from the plaintiff or the defendant that the flood was caused due to the 'danger ... expressly created' by DBKL. The only known allegation by the defendant against DBKL was this: that DBKL purportedly failed to maintain an adequate drainage system.

In regard to the finding by the Court of Appeal in *Stephen Phoa's* case that the local authority there was liable for the danger created, the Court of Appeal remarked at p 619 of the report in the following terms:

E If the local authority in *Kane v New Forest District Council (supra)* could not wash its hands off the danger in the footpath it required to be constructed, we are unable to see how the fourth defendant could possibly escape liability in the present case for requiring the diversion of the East stream. Accordingly, we set aside the indemnity granted to the fourth defendant by the trial judge. The consequence is that the fourth defendant is liable to the plaintiffs in the tort of negligence. We would add for good measure that the kind of harm that was foreseeable by the fifth defendant was equally foreseeable by the fourth defendant. Upon the evidence on record and applying to it the relevant principles already referred to earlier in this judgment, it is clear that the fourth defendant must as a reasonable local authority foreseen the danger created by diverting the East stream would probably cause a landslide of the kind that happened and that in such event, resultant harm, including financial loss of the kind suffered by the plaintiffs would occur. We would in the circumstances uphold the apportionment of liability as against the fourth defendant.

H So, it is quite evident from the above mentioned passages that the liability against the local authority there was founded and was based on the danger created by the local authority there in requiring the diversion of the stream. Nothing of that sort happened in the present case at all. DBKL did not do anything at all.

I It would be wrong to say as was said by the defendant that DBKL owe a duty to the legal owners of land to pay damages in the event of a flood. Based on the provisions of ss 53(1) and 54(1) of the Act, I must hold that DBKL does not owe any duty of care nor is it liable to pay damages to the legal owners of land in the event of a flood nor would DBKL be liable or is

under a duty of care to those illegal squatters whose squatter huts are affected by flood. A

Be that as it may, the facts in *Stephen Phoa* and the present case are poles apart. Sticking out like a sore thumb is the unequivocal fact that the plaintiff and the 71 others are illegal squatters who have illegally erected squatter huts along the river banks of Sungai Klang. B

The third issue

It must be borne in mind that the particulars of negligence as enumerated in the statement of claim relate directly to the positive actions taken by the defendant in causing the flood to occur by bringing heavy machinery and building equipment and placing them in the river. The alleged negligence of the defendant does not concern DBKL at all and it was the defendant who had created the danger to cause the flood. The danger created by the defendant does not concern DBKL at all and neither is it in any way connected with DBKL so as to enable the defendant to claim contribution against DBKL. C D

The fourth issue

As I said, it is not disputed that the plaintiff and the other 71 persons are squatters who had illegally built squatter huts on the river banks of Sungai Klang. It must be borne in mind that the plaintiff's present claim together with the 71 others flow from the illegal erection of those squatter huts which contravened the various statutory provisions as alluded to earlier. Had the squatter huts not been erected illegally on the river banks of Sungai Klang, the purported claim for damages by the plaintiff and his friends would not have arisen. E

On illegal squatters, I need to refer to the case of *Sidek bin Haji Muhammad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313, a decision of Raja Azlan Shah CJ (Malaya) (as His Majesty then was). At p 314, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) succinctly said: F

In our opinion there is one issue which lies at the heart of this case. It is whether the appellants have a cause of action against the respondents. The answer is obvious. It is clear beyond doubt that they cannot succeed because they are squatters. Squatters have no right either in law or in equity. (See *McPhail v Persons Unknown CA* [1973] 1 Ch 447, 456). It does not lie in their mouths to assert that they used and occupied the land as squatters. G

Further down at the same page, His Majesty had this to say: H

What equitable right or interest can be conjured up for the squatters who have illegally occupied State land? Squatters go into possession by, or as a result of, illegal occupation of State land. Illegal occupation of State land is an offence under s 425 of the National Land Code. It is well established that a court of equity will never assist squatters to resist an order of possession illegally acquired; it will never intervene in aid of wrong-doers. (See *Grafton v Griffin* 39 ER 130). I

A Likewise in the case of *Shamsudin bin Che Mat & Ors v Datuk Bandar Kuala Lumpur* [2000] 4 MLJ 177, Faiza Tamby Chik J aptly said at p 186 of the report:

B The next paramount issue is whether the applicants can prevent the respondent from exercising their rights under the regulations on the grounds of equitable estoppel, ie on a purported promise which would defeat the laws of the country and in this case s 425 of the Code and regs 18 and 19 of the regulations? The respondent cannot be restrained to act against the applicants who had clearly violated the law.

Continuing at the same page and spilling over to p 187 of the report, his Lordship Faiza Tamby Chik J said:

C No assurance made against a statute would create equitable estoppel. In the instant case, the purported assurance to allow the applicants to occupy state land is against the Code and the regulations. In the textbook, *Administrative Law of Malaysia and Singapore* (3rd Ed), the author at p 538 states:

D An element common to both, s 115 and the equitable estoppel, however, is that none operates against a statute; the authority making the representation will not be forced to infringe a statute. Similarly, the doctrine of substantive legitimate expectation, as discussed above, has yet to find a foothold in Malaysia or Singapore’.

E So it can be surmised that the plaintiff together with 71 other persons are not entitled to claim for damages as prayed for in their statement of claim because as squatters they ‘have no right in law or in equity’. At any rate, the plaintiff’s claim brings into sharp focus the principle of *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) because the plaintiff’s claim for damages arises from their illegal act of erecting and occupying squatter huts. Yong Pung How CJ (Singapore) in the case of *Ooi Han Sun & Anor v Bee Hua Meng* [1991] 3 MLJ 219, at p 223 said:

F As a rule of public policy, the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in the law of contract to prevent a plaintiff founding a claim on an illegal act or agreement. It is clear, however, that the maxim has only very limited application in tort and, in general, the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence: *Henwood v Municipal Tramway Trust* (SA)(1938) 60 CLR 438; *National Coal Board v England* [1954] AC 403; [1954] 1 All ER 546; *Progress and Properties Ltd v Craft* (1976) 12 ALR 59; *Jackson v Harrison* (1978) 19 ALR 129. The only exceptions would appear to be the limited range of cases in which, on the facts of the case, an injury can be held to have been directly incurred in the course of the commission of a crime: *Godbolt v Fittock* (1963) 63 SR (NSW) 617; [1964] NSW 22; *Smith v Jenkins* (1970) 44ALJR 78; *Ashton v Turner* [1981] QB 137; [1980] 3 All ER 870; *Pitts v Hunt & Anor* [1990] 3 All ER 344.

I Now, the case of *Ooi Han Sun* involved a claim that arose from a motor accident and there the first plaintiff, inter alia, had claimed for loss of income. But the first plaintiff was unable to show any evidence that he had a work permit in Singapore and neither was any evidence led to show an application for work permit had been or would be made, or, indeed, that an

application would necessarily be successful, if made. At pp 224–225 of the report, Yong Pung How CJ (Singapore) aptly said: A

In my judgment, the assessment of the first plaintiff's loss of earnings should be based on an estimate, however difficult and imprecise this might be, of what he would have earned in Malaysia had there been no accident to him. The immigration laws and regulations which require work permits to be obtained by foreign workers before they can work in Singapore were not designed merely to raise a little extra revenue, but to implement a basic public policy. To compensate the first plaintiff on the basis of what he might have earned by working illegally in Singapore without a valid work permit would be against public policy and wholly improper. Apart from the first plaintiff's statement in his evidence that he expected Ching to get a work permit for him soon, there was no evidence whatsoever that an application for a work permit had been or would be made, or, indeed, that an application would necessarily be successful, if made. An examination of his passport showed that, although he made numerous visits to Singapore from 1978 to 1983, he had only been issued with a work permit for two successive three-month periods in 1980 and on all other occasions was in Singapore only on a social visit pass which prohibited employment. It would appear that he had no work permit even in his most recent job as a fitter and welder in another shipyard which he left for Ching only a few days before the accident. B
C
D

It is quite evident that from the case of *Ooi Han Sun*, that the learned Chief Justice refused to compensate the first plaintiff for the earnings which he gained by working illegally in Singapore because there was no cogent evidence that the first plaintiff was expected to get a work permit in Singapore. E

In Malaysia, in the case of *Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394, the Supreme Court had occasion to apply the principle of *ex turpi causa non oritur actio*. Writing for the Supreme Court Peh Swee Chin SCJ had this to say at p 401 of the report: F

We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we would also follow, on this point, the decisions of *Ooi Han Sun*; *Burns*; *Lebagge* and *Dhlamini* and approve the dictum in question in *Yaacob*. We therefore uphold the decision of the learned judge in the court below and that of the learned Registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operation of the taxi should be disallowed; because *ex turpi causa non oritur actio* or in other words, such claim would be against public policy. We would like to emphasize the timely caution of the learned Chief Justice of Singapore in *Ooi's* case that the maxim has a limited application in tort. The maxim's principle role lies mainly and almost exclusively in actions on contract. G
H

But the learned counsel for the defendant cited the case of *Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (Si mati) & Ors v TP Saffeer & Anor* [1998] 4 CLJ 241 and argued that the issue of *ex turpi causa non oritur actio* is a matter to be decided at the full trial. I venture to say that the facts in that case ought to be distinguished from the facts of the present case. That was a case involving a motor vehicle accident where the deceased was working I

A in Malaysia without a work permit. At pp 251–252 of the report of that case — referring to *TP Saffeer's* case, this was what I said:

B But the illegality of the deceased's employment could have been legitimized. At this stage, a repetition of the facts is necessary. The deceased held a red identity card and according to SP1 the deceased was a permanent resident. At the time of the accident, the deceased's father was in Malaysia. SP1 promised to obtain the work permit for the deceased within a period of three months from the date of recruitment. There was no evidence to show that the deceased was unlikely to obtain a work permit. The same scenario appeared in *Nazori bin Teh & Anor v Tay Lye Seng & Anor* [1995] 4 CLJ 740 where the defendant failed to show that the first plaintiff was unlikely to get a work permit. It was for this reason that the learned judge was of the view that the illegality was capable of being legitimized. At p 743 of the judgment, the learned judge in *Nazori bin Teh & Anor v Tay Lye Seng & Anor* had this to say and which I respectfully adopt:

D 'At p 30 of the judgment, the learned judge citing *Ooi Han Sun & Anor v Bee Hua May* [1991] 3 MLJ 219, another Singapore High Court case where no work permit was issued, succinctly summarized the principles in *Ooi Han Sun's* case as follows:

- E
- F
- (i) that the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in law of contract to prevent a plaintiff founding a claim on an illegal act or agreement;
 - (ii) that the maxim has a limited application in tort and the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence in tort;
 - (iii) the effect of illegality on quantum of damages is not to make compensation hopeless;
 - (iv) that notwithstanding illegality damages would be awarded but there would be a discount for the *ex turpa causa*;
 - (v) that consideration should be given to cases where illegality was capable of being legitimized; and
 - (vi) that the burden of proof of illegality was capable of being legitimized was on the plaintiff.'

G In my judgment, the earnings of the deceased can, in law, be legitimized and that being the case the earnings derived as a cook from Zam Zam restaurant was not illegal. Those earnings can be computed for purposes of loss of earnings sustained by the widow and her son. This was my judgment and I so hold accordingly.

H It must be borne in mind that illegality was capable of being legitimized and the burden of proof of legitimacy rested with the present plaintiff and sadly that burden of proof was not discharged.

I In my judgment, the principle of *ex turpi causa non oritur actio* ought to be applied to the facts of the present case for the following reasons:

- (1) the present case is not a motor accident case where the plaintiff through no fault of his own had died or suffered personal injuries;
- (2) the plaintiff together with the 71 other persons are, pure and simple, squatters who had contravened the various provisions of the law by erecting illegal squatter huts on the river banks of Sungai Klang;

- (3) the purported damage as pleaded and framed in the statement of claim arose directly from the illegal acts of the plaintiff and his friends and that being the case, the issue of compensation did not arise at all; **A**
- (4) that, on the facts, there is no wrongdoing on the part of DBKL and that the wrongdoers would be the plaintiff together with the other 71 persons who had on their own accord erected the squatter huts on the river banks of Sungai Klang; **B**
- (5) DBKL is not, in law, liable for damages to the plaintiff and his 71 friends and DBKL too does not, under the law, owe any duty of care to the plaintiff and the 71 others; **B**
- (6) that the defendant is presently bringing a third party action against the first proposed third party for failing to act and not for any wrongdoing, and I may add that the plaintiff and the 71 others are not alleging any wrongdoing against DBKL; and **C**
- (7) that the illegal acts of erecting squatter huts cannot be legitimized because it contravened the relevant provisions of the statutes as alluded to in this judgment. **D**

And so for all these reasons, I must hold and it is my judgment that based on the undisputed facts, the maxim *ex turpi causa non oritur actio* should be vigorously applied in the present case and it would be a waste of judicial time to grant leave to issue a third party notice to the first proposed third party — a non-entity. **E**

Conclusion

This was not a fit and proper case for a third party notice to be issued to either the first proposed third party or to Datuk Bandar Kuala Lumpur (DBKL). The present appeal in encl 29 ought to be dismissed with costs and I made that order accordingly. **F**

Appeal dismissed with costs.

Reported by Mariette Peters-Goh

G

H

I